4/6/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Northwest EnviroService, Inc.,	)	Docket No. RCRA-1092-08-07-3008(a)
	)	
Respondent	)	

ORDER ON MOTIONS

Currently pending are:

I. Complainant's Motion for Reconsideration of the Order, dated June 8, 1993, insofar as it granted NWES' request for the production of Item 1(c) as identified in its motion for discovery, dated March 19, 1993;

II. NWES' Motion for Accelerated Decision Dismissing Count IV of the Complaint, dated May 26, 1993; and

III. NWES' Motion for Leave to Amend Answer, dated July 2, 1993.[1/]

These motions will be considered seriatim.

[1/] Although Complainant filed a notice of intent to amend the complaint so as to allege that the "Freuhauf Pit" is a tank rather than a surface impoundment, and has represented that NWES voiced no objection to the amendment, no motion for leave to amend has been filed to date.

I. Complainant's Motion For Reconsideration

NWES' Motion for Discovery, dated March 19, 1993, described documents and information sought as follows:

> 1) All documents and information relating to EPA's decisions to declare NWES' facility ineligible for receipt of off-site wastes pursuant to its Off-Site Policy, including but not limited to:
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> > a) the facts and rationale leading EPA to declare NWES ineligible to receive off-site wastes, including all documents relating to this determination;
> >
> > b) all documents reflecting or relating to communications between EPA personnel and other federal, state or local agencies regarding the non-responsibility determination for NWES;
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> > c) information and documents relating to EPA's issuance of a September 23, 1992 letter declaring NWES not responsible with respect to government contract or subcontract awards;
> >
> > d) all documents in the Contracting Officer's files with respect to contracts [contacts?] between EPA Region X and CET Environmental Services that relate to disqualification or a non-responsibility determination of NWES as a subcontractor.

Opposing the motion, Complainant asserted, inter alia, that much of the information requested lacks any significant probative value "because the information sought is unrelated to this action "(Opposition, dated March 26, 1993, at 3, 4). Nevertheless, the Order, dated June 8, 1993, directed Complainant to produce for inspection and copying, among others, Item Nos. 1(a), 1(b), and 1(c) as described above.

Moving for reconsideration, Complainant reiterates that Item 1(c) relates solely to a contract determination of non-

responsibility and is not relevant to the RCRA complaint and compliance order (Motion for Reconsideration, dated June 17, 1993, at 1, 2). Complainant also asserts that certain of the documents, arguably within the scope of the request, are immune from discovery under the "deliberative process privilege" and as "attorney work-product." In support of the first basis for the claimed immunity, Complainant says that certain of the documents, which are all draft enforcement actions, contain information which is sensitive and that, if released, would be injurious to the deliberative process (Motion at 5). Additionally, Complainant states that the draft enforcement documents are all considered attorney work-product. Complainant asks that the order be reconsidered or, alternatively, that the documents be reviewed in camera.[2/]

NWES responded to the motion under date of June 22, 1993, pointing out that the ALJ had twice rejected Complainant's relevancy arguments, firstly, in a letter-order, dated March 8, 1993, which denied Complainant's Motion To Strike and to Dismiss Affirmative Defenses, for the reason, among others, that matters

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[2/] Motion at 6, 7. Attached to the motion are copies of letters, dated September 23 and 25, 1992, from EPA to CET Environmental Services, which state that NWES has been determined to be non-responsible, and which presumably reflect the determination referred to in Item 1(c) of NWES' discovery request. Also attached to the motion are copies of records of proceedings of the City of Seattle, newspaper articles concerning NWES, inspection reports, an affidavit stamped confidential, and letters to NWES from EPA and the Washington Department of Ecology. These documents have apparently been shared with NWES and are not involved in the present controversy.

related to an alleged de facto debarment may be relevant to the determination of a penalty, and secondly, in the discovery order I am being asked to reconsider.[3/] NWES argues that the motion for reconsideration is improper and asserts that as long as NWES' affirmative defenses regarding the non-responsibility determination and Off-Site Policy remain in this case, discovery regarding these matters is clearly calculated to lead to admissible evidence. NWES argues that Complainant has failed to establish that the information sought is protected by the "deliberative process privilege" or as "attorney work-product."

Complainant filed a reply brief on June 25, 1993, which revealed for the first time that only two documents were involved in its deliberative process and attorney work-product privilege claims. The deliberative process privilege was invoked with respect to a draft memorandum prepared by Ms. Jeanne A. Pascal and a draft exhibit prepared by Ms. Pascal was claimed to be attorney work-product. Attached to the reply brief is an affidavit by Gerald A. Emison, Acting Regional Administrator, dated June 25, 1993, asserting the deliberative process privilege with respect to a draft memorandum, dated

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[3/] Although the only factors required to be considered in assessing penalties for violations of the Act are "the seriousness of the violation and any good faith efforts to comply with applicable requirements" (RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3)), the complaint at para. 22 reflects that "other factors as justice may require" were also considered. There is no injustice in taking Complainant at his word and applying the quoted phrase in determining the scope of discovery and an appropriate penalty, if a penalty is warranted.

December 14, 1990, prepared by Jeanne A. Pascal, an attorney formerly in the Office of Regional Counsel, with respect to a non-responsibility determination concerning NWES. Assertedly, the draft was never forwarded to the Agency's decision official for action. The affidavit reflects Mr. Emison's judgment that disclosure of the memorandum would harm the public interest by inhibiting the honest and frank communication necessary to effective policymaking. There is no evidence that the concurrence of the General Counsel was sought or obtained prior to, or since, the date the affidavit was issued.

Complainant also points out that there is a distinction between an "Off-Site Notice," which is governed by CERCLA policy and procedure, and a contracting officer's determination of an entity's ability to perform a particular contract, which is governed by Federal Acquisition Regulations. The former is assertedly an assessment, based on the probability of releases of hazardous constituents at a facility and/or serious violations of local, state or federal law, that a facility is not eligible for receipt of CERCLA waste from outside the facility.[4/]

[4/] The "Off-Site Policy: RFA or Equivalent Investigation Requirement at RCRA Treatment and Storage Facilities," dated January 4, 1988, contains procedures whereby the facility determined to be ineligible may request an informal conference with the responsible official issuing the notice and request reconsideration of the decision by the Regional Administrator or responsible state official. Presumably, these procedures are intended as a safeguard against arbitrary or incorrect decisions or the appearance thereof.

In a sur-reply, dated June 29, 1993, NWES alleged that Complainant has misled this tribunal in asserting that it has withheld only two documents responsive to NWES' request No. 1(c). Referring to the Agency's response, dated January 28, 1993, to NWES' Freedom of Information Act request, dated November 4, 1992, NWES points out that the Agency identified seven additional documents, which were considered relevant to its non-responsibility determination. These documents, which were withheld pursuant to the deliberative process privilege, were identified as follows:

1) Internal Memorandum - dated 5/30/91

2) Internal Mail Message dated 10/14/92

3) Letter dated 9/28/92

4) Fax Message - dated 10/02/92

5) Internal Mail Message dated 9/28/92, 7:50 A.M.

6) Internal Mail Message dated 9/25/92, 1:15 A.M.

7) Internal Memorandum dated 10/92

NWES requests that Complainant be directed to immediately produce the listed documents, reiterates its contention that Complainant's motion for reconsideration as to the "Pascal documents" is improper, emphasizes that the burden is on Complainant to justify with particularity the reasons why either the work product or deliberative process privileges should be invoked and to submit sufficient detail that a reasoned determined of the legitimacy of its claims may be made. Absent

such detail and explanation, NWES argues that Complainant's belated excuses should not be entertained.

In its response, dated July 9, 1993, Complainant says that the documents listed in its FOIA response are not within the scope of NWES' request No. 1(c), but rather are covered by No. 1(d) (supra at 2), which was in effect denied by the order of June 8, 1993. Complainant makes the same assertion with respect to the two documents at issue in its motion for reconsideration.[5/] Complainant states that if the ALJ orders production of the documents, it will consider the assertion of attorney client, attorney work-product and deliberative process privileges as applicable.[6/]

D I S C U S S I O N

Complainant's repeated assertions that the documents sought are irrelevant to any issues herein is again rejected. As indicated in the letter-order, dated March 8, 1993, which denied the Motion to Strike and to Dismiss Affirmative Defenses, matters related to the determination that NWES was ineligible for the receipt of off-site waste may be relevant to the

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[5/] If this is accurate, the documents were not included in the order to produce and the motion for reconsideration and the several responses and replies thereby generated were pointless.

[6/] Complainant appears to be of the view that it may stall discovery indefinitely by asserting at its leisure whatever privileges it might consider applicable. As the order herein demonstrates, such is not the case.

determination of a penalty. This was the basis for the order of June 8, 1993, directing Complainant to produce Items 1(a), 1(b) and 1(c) of NWES' discovery request of March 19, 1993, which the introductory sentence made clear related primarily to the Agency's decision to declare NWES ineligible for the receipt of off-site waste (ante at 1, 2). As indicated (supra note 3), "other factors as justice may require" are among criteria to be applied in assessing any penalty herein. Moreover, NWES' business is handling waste and it is unlikely the determination that NWES is ineligible for the receipt of off-site waste can be separated from the decision that it is non-responsible for the award of government contracts or subcontracts. It is concluded that documents within the scope of NWES' request may not be withheld for lack of relevance.

Although Complainant now says that the two"Pascal documents" are not within the scope of Item 1(c) of NWES' discovery request, this belated contention is disregarded as it is clear NWES continues to demand production of these documents. In this connection, the Acting Regional Administrator's affidavit claims the deliberative process privilege only as to a draft memorandum, dated December 14, 1990. In order for this claim to be accepted, the concurrence of the General Counsel (not ORC) must be obtained. Accordingly, Complainant will be directed to produce the second of the "Pascal documents," the draft exhibit, and absent the concurrence of the General Counsel

as to the claim of deliberative process privilege, the mentioned draft memorandum.

As to the seven documents for which the deliberative process privilege was claimed in response to NWES' FOIA request, there is no evidence that accepted procedures, i.e., a claim of privilege by the Regional Administrator and the concurrence of the General Counsel, were followed. In the absence of compliance with these procedures or the prompt assertion and substantiation of any other privilege, Complainant will be directed to produce these documents.

II. NWES' Motion For Accelerated Decision

Count IV of the complaint alleges that NWES failed to mark equipment, perform required inspections and maintain required records in violation of 40 CFR Part 265, Subpart BB, e.g., §§ 1050 and 1064. Under date of May 26, 1993, NWES submitted a motion for an accelerated decision dismissing Count IV, contending that these alleged violations were not true and could not be substantiated. Moreover, NWES asserted that the alleged violations were based upon impermissibly vague regulations.

In an accompanying memorandum in support of the motion, NWES outlines the steps taken to comply with Subpart BB including the preparation of a written synopsis and implementation plan. Pursuant to the plan, NWES says that it identified and listed all equipment, which was covered by the regulations, and all equipment, which was exempted because it was in vacuum service. Additionally, NWES allegedly recorded

all required information in the operating log, and insured that all of its valves were capped. All systems covered by the regulation were allegedly marked, were fenced behind a locked gate and a sign was posted on the gate identifying covered equipment. These "facts" are supported by the affidavit of Mr. Jerry Bartlett, Vice President, General Manager and officer then responsible for environmental compliance.

According to Mr. Bartlett, the implementation plan was shown to EPA representatives and the operating log was available, had it been requested, at the time of EPA's annual inspection on November 15, 1991. Further, according to Mr. Bartlett, the inspection focused primarily on Subpart AA entitled "Air Emission Standards for Process Vents," which like Subpart BB was effective December 21, 1990, and from which NWES was subsequently determined to be exempt.

Concerning the applicability of Subpart BB, 40 CFR § 265.1050(b) provides:

> (b) Except as provided in § 265.1064(j), this subpart applies to equipment that contains or contacts hazardous wastes with organic concentrations of at least 10 percent by weight that are managed in:
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> (1) Units that are subject to the permitting requirements of part 270, or
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> (2) Hazardous waste recycling units that are located on hazardous waste management facilities otherwise subject to the permitting requirements of part 270.
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> (c) Each piece of equipment to which this subpart applies shall be marked in such a manner that it can be distinguished readily from other pieces of equipment.

(d) Equipment that is in vacuum service is excluded from the requirements of § 265.1052 to § 265.1060 if it is identified as required in § 265.1064(g)(5).

Additionally, § 265.1064, entitled "Recordkeeping requirements," provides in pertinent part:

(a)(1) Each owner or operator subject to the provisions of this subpart shall comply with the recordkeeping requirements of this section.

* * *

(b) Owners and operators must record the following information in the facility operating record:

(1) For each piece of equipment to which subpart BB of part 265 applies:

(i) Equipment identification number and hazardous waste management unit identification.

(ii) Approximate locations within the facility (e.g., identify the hazardous waste management unit on a facility plot plan).

(iii) Type of equipment (e.g., a pump or pipeline valve).

(iv) Percent-by-weight total organics in the hazardous waste stream at the equipment.

(v) Hazardous waste state at the equipment (e.g., gas/vapor or liquid).

(vi) Method of compliance with the standard (e.g., "monthly leak detection and repair" or "equipped with dual mechanical seals").

* * *

(g) The following information pertaining to all equipment subject to the requirements in §§ 265.1052 through 265.1060 shall be recorded in a log that is kept in the facility operating record:

* * *

(5) A list of identification numbers for equipment in vacuum service.

* * * *

According to NWES, it was at all times in compliance with the applicable requirements of § 265.1064, the balance of the cited section not being applicable to it. It claims that EPA has issued a letter to that effect.

NWES' contention that the marking requirement of § 265.1050(c), which essentially requires that each piece of equipment shall be marked in such a manner that it may readily be distinguished from other equipment, is unconstitutionally vague as applied to it is based upon the lack of a definition of the terms "system" or "marked" in the regulation.[7/] NWES says that it appropriately marked its equipment so that it could be readily distinguished from other equipment. NWES claims to have identified all systems or units that contained or contacted hazardous wastes with organic concentrations of at least ten percent by weight, and marked such equipment by placing identification numbers thereon. Additionally, NWES says that it provided charts listing each piece of equipment which was covered and its identification number and posted a chart with this information on the fence, which enclosed the equipment.

[7/] Section 265.1051 incorporates the definitions of § 264.1031 into Subpart BB and § 264.1031 defines "equipment" as follows: "(e)quipment means each valve pump, compressor, pressure relief device, sampling connection system open-end valve or line, or flange, and any control devices or systems required by this subpart."

NWES acknowledges that EPA interpreted the regulation differently, informing NWES in June 1992 that every valve on each tank system had to be conspicuously marked. NWES argues that the regulation is susceptible to, and that common sense compels, the interpretation it advances. According to NWES, EPA's arbitrary and punitive enforcement action is prohibited by the Fifth Amendment to the Constitution.

Opposing the motion, Complainant alleges that NWES was not in compliance with Part 265, Subpart BB at the time of the inspection on November 15, 1991, and was not in compliance therewith at the time of the inspection on July 29, 1992 (Response Brief In Opposition To Respondent's Motion For Accelerated Decision, dated June 7, 1993). Moreover, EPA denies ever acknowledging that NWES was in compliance with Subpart BB.

Unsurprisingly, Complainant has a different version of events at the inspection on November 15, 1991, quoting Mr. Bartlett as stating, among other things, that he was aware of the requirements of Subpart BB, but that NWES had not yet developed or implemented a program to come into compliance with those requirements. Inspection sheets produced by Mr. Bartlett were allegedly not specific to Subpart BB requirements and did not document required weekly visual checks or monthly instrumental checks of light liquid service pumps or light liquid service valves as required by 40 CFR §§ 265.1052 and 265.1057 and did not document monthly instrumental checks of heavy liquid service pumps or heavy liquid service valves as

required by § 265.1058. In this regard, the EPA inspector, Mr. Kevin Schanilec, disputes NWES' contention that it is entitled to the exemption provided by 40 CFR § 265.1050(d) for equipment in vacuum service (Affidavit at 13).

Other statements attributed to Mr. Bartlett at the time of the November 15 inspection include the assertion that, other than a few yellow hoses in the chemical processing area, no equipment was marked as required and that required monitoring for possible equipment leaks was not being performed. The former statement was allegedly verified by EPA inspectors. Assertedly, the inspectors informed Mr. Bartlett that NWES was not in compliance with Subpart BB.

At the time of the inspection on July 29, 1992, the EPA inspectors were given copies of monthly instrumented leak checks of various valves throughout the facility dating back to September of 1991. The inspectors observed that certain equipment was now painted orange. According to EPA, however, the facility was not in compliance with Subpart BB.

Arguing that genuine issues of material fact exist, Complainant urges that NWES' motion for accelerated decision be denied in its entirety.

In a reply, dated June 16, 1993, NWES reiterated that it is entitled to an accelerated decision dismissing Count IV, because Complainant has failed to establish a prima facie case that NWES violated Subpart BB. Pointing out that Complainant repeatedly alleges that NWES is in violation of Subpart BB, NWES argues

that EPA has failed to back that allegation with admissible evidence of the equipment subject to Subpart BB for which NWES failed to (1) keep records, (2) inspect and monitor, and (3) properly label (Reply at 2).

NWES argues that the Agency has failed to establish either a prima facie case or a genuine issue of material fact with respect to Count IV. According to NWES, in order to establish a prima facie case Complainant must demonstrate: (1) which pieces of equipment are subject to Subpart BB; (2) a showing of how this equipment was not "marked" in such a manner that it could be distinguished readily from other pieces of equipment, as required by 40 CFR § 265.1050(c); (3) a showing of how this equipment was not inspected in accordance with applicable inspection requirements of Subpart BB; and (4) a showing that the recordkeeping regarding this equipment was not in compliance with recordkeeping requirements of Subpart BB (Reply at 5, 6). NWES asserts that its motion may not be defeated by Complainant's conclusory statements and that the affidavits of the inspectors, Kevin Schanilec and Jack Boller, are loaded with inadmissible hearsay, which may not, for the purposes of the motion, be used to support the violations alleged.

D I S C U S S I O N

NWES' contention that the affidavits of Messrs. Schanilec and Boller, which quote statements attributed to Mr. Bartlett during inspections of NWES' facility, are loaded with

inadmissible hearsay is erroneous. If NWES' view were the rule, a witness could never testify as to a conversation with another person in which the witness participated. Instead, Federal Rule 801(d), entitled "Statements which are not hearsay" provides in pertinent part at (2) "Admission by Party-opponent - (t)he statement is offered against a party and is (A) his own statement, in either his individual or representative capacity. . . ." No reason is apparent why the statements of Mr. Bartlett, as an officer of NWES, are not within this rule.

Moreover, most, if not all, of the statements attributed to Mr. Bartlett in the Schanilec affidavit are also contained in the inspection report prepared by Mr. Schanilec (C's Pre-hearing Exh 10). The report appears to be admissible as a Public Record and Report under Federal Evidence Rule 803(8)(c) "in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law. . . ." See, e.g., In re Korean Air Lines Disaster, 932 F.2d 1475 (D.C. Cir. 1991). Additionally, Rule 22.22 of the Consolidated Rules of Practice (40 CFR Part 22) which governs this proceeding, instructs the ALJ to admit "all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, . . ." While no opinion is expressed as to the credibility of Messrs. Schanilec, Boller or Bartlett, the differing versions as to events during the inspections are not

matters appropriate for resolution on a motion for summary judgment.

Apart from the question of whether Mr. Bartlett made the statements and admissions attributed to him by Messrs. Schanilec and Boller, the rule is well settled that on summary judgment, all inferences from the facts established and any doubts as to the facts will be resolved in favor of the non-moving party.[8/] In this regard, NWES asserts that applicable inspection and monitoring requirements are found at 40 CFR § 265.56. This position appears to be at odds with the apparent claim of exemption from the requirements of §§ 265.1052 through 265.1060, because certain of its equipment (hoses) was in vacuum service.[9/] The record does not permit a determination of equipment in vacuum service and thus within the exemption in § 265.1050(d). Moreover, it is noted that Mr. Schanilec disputes

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[8/] See, e.g., In the Matters of Salem Tube, Inc. and Salem Liquidating Corp., Docket No. EPCRA-III-090 (Order Denying Motion For Accelerated Decision, March 8, 1994).

[9/] Schanilec Affidavit, ¶ 39. NWES is on firmer ground in contending that hoses are not within the definition of a connector and thus not within the monitoring requirements of § 265.1058(a) which requires monitoring of, inter alia, "flanges and other connectors" if evidence of a potential leak is detected. Section 264.1031 defines connector as follows:

> Connector means flanged, screwed, welded, or other joined fittings used to connect two pipelines or a pipeline and a piece of equipment. For the purposes of reporting and recordkeeping, connector means flanged fittings that are not covered by insulation or other materials that prevent location of the fittings.

NWES' claim that equipment in vacuum service was identified as required by § 265.1064(g)(5) (Affidavit at ¶ 41).

Section 265.1056(a) and (b) says nothing about either inspection or monitoring, but instead imposes a flat requirement that each open-ended valve or line shall be equipped with a cap, blind flange, plug, or a second valve.[10/] Although NWES is correct that Complainant has not responded to its contention that, because its valves were open ended and capped, NWES was not subject to inspection and monitoring requirements, the basis for this claimed exemption is not clear.

NWES also appears to be correct that Complainant has assumed, but not established, that NWES has pumps and valves in light and heavy liquid service within the meaning of §§ 265.1052, 265.1057 and 265.1058. While NWES may have a point as a matter of summary judgment procedure, it is unlikely that any court in the land would grant its motion absent a complete factual record as to its methods of operation, the equipment

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[10/] Section 265.1056(a) and (b) provides:

> (a)(1) Each open-ended valve or line shall be equipped with a cap, blind flange, plug, or a second valve.
>
> (2) The cap, blind flange, plug, or second valve shall seal the open end at all times except during operations requiring hazardous waste stream flow through the open-ended valve or line.
>
> (b) Each open-ended valve or line equipped with a second valve shall be operated in a manner such that the valve on the hazardous waste stream end is closed before the second valve is closed.

subject to the regulation and NWES' efforts to comply. In short, this case cries out for an evidentiary hearing where these matters may be explored.

Moreover, although NWES contends that interpretation of the marking requirement of § 265.1050(c) is strictly a matter of law, the regulation appears to be susceptible to more than one interpretation and expert testimony as to the purpose and application of the regulation would be helpful in resolving the question of the reasonableness of any particular interpretation. For all of the above reasons, NWES' motion for an accelerated decision dismissing Count IV will be denied.

III. NWES' Motion for Leave to Amend Answer

NWES' motion to amend its answer seeks to add a defense based on EPA's non-compliance with the Paper Reduction Act (44 U.S.C. §§ 3501 et seq.) By a letter, dated June 15, 1993, Complainant alerted NWES and the ALJ to the fact that certain information collection request control numbers, applicable to violations alleged in the complaint, may not have been properly displayed in the Federal Register or the Code of Federal Regulations or may have lapsed. Complainant has indicated that it does not oppose the motion and it will be granted.

O R D E R

The Regional Administrator has claimed the deliberative process privilege only with respect to the draft memorandum, dated December 14, 1990, and Complainant is directed to furnish

a copy of the draft exhibit to NWES on or before April 22, 1994. Absent concurrence of the General Counsel in the deliberative process privilege claim, Complainant is ordered to furnish a copy of the mentioned draft memorandum to NWES on or before April 22, 1994.

As to the seven documents involved in NWES' FOIA claim, Complainant is directed to furnish the documents to NWES on or before April 22, 1994, or fully support any claim of deliberative process privilege, attorney work-product or attorney-client privilege.[11/]

NWES' motion for an accelerated decision dismissing Count IV of the complaint is denied.

NWES' motion to amend its answer so as to add a defense based on the Paperwork Reduction Act is granted.

Dated this 6th day of April 1994.

Spencer T. Nissen
Administrative Law Judge

[11/] It is worthy of note that the attorney-client privilege is applicable to the client, not the attorney.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON MOTIONS**, dated April 6, 1994, in re: Northwest EnviroService, Inc., Dkt. No. RCRA-1092-08-07-3008(a), was mailed to the Regional Hearing Clerk, Reg. X, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: April 6, 1994

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